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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 6, 2001

Acting Secretary William Caton
Federal Communications Commission
445 12th Street, S.W.
Room TWB204
Washington, D.C. 20554

Ex Parte Presentation in CS Docket No. 97-80

Dear Mr. Caton:

Pursuant to Section 1.1206 of the Commission's rules, an original and one copy of this letter are being filed as notice that representatives of Disney, Fox, Viacom, Vivendi Universal, Sony Pictures, AOL Time Warner, and the Motion Picture Association of America (MPAA) attended a meeting on February 1, 2001, with the following representatives of the FCC: Ken Ferree (Chief, CSB), Rick Chessen (MMB), Amy Nathan (OPP), Jonathan Levy (OPP), Bill Johnson (CSB), Barbara Esbin (CSB), Tom Horan (CSB), Steve Broeckhaert (CSB), Mike Perko (CSB), Mike Lance (CSB), Walid Kassem (CSB), Susan Mort (CSB), and Alan Stilwell (OET). Representing Viacom were Paul Heimbach and Anne Lucey. Representing Fox was Maureen O'Connell. Representing Disney were Preston Padden and Susan Fox. Representing Vivendi Universal was Matt Gerson. Representing AOL Time Warner was Elizabeth Frazee. Representing Sony Pictures was Alicia Smith. Lastly, representing MPAA was Fritz Attaway.

The proceeding at issue is not restricted and therefore presentations are permitted, but must be disclosed. At the meeting, the attached talking points were discussed. The talking points were prepared by the five studio group ("5S"), which includes Disney, Fox, Viacom, Vivendi Universal, and MGM.

Yours truly,

Susan L. Fox

Susan L. Fox

cc: Ken Ferree, Chief, CSB
Rick Chessen, MMB
Amy Nathan, OPP

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Bill Johnson, CSB
Barbara Esbin, CSB
Tom Horan, CSB
Steve Broeckhaert, CSB
Mike Perko, CSB
Mike Lance, CSB
Walid Kassem, CSB
Susan Mort, CSB
Alan Stilwell, OET

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5 Studio "Talking Points" Re: 5C

1. There is a need for government to help establish common, broadly adopted technological methods of content protection within and between digital media devices. Absent such measures, consumers and content owners will be confronted with multiple incompatible standards that will retard the roll out of new digital services.

2. As a sub-set of this overall problem, the Studios have been working with the DTLA licensing entity on a content protection technology known as DTCP or "5C." The 5C technology provides content protection for audio/video signals between digital media devices such as DVD players, TV's, set top boxes and VCR's. CONCLUDING THESE NEGOTIATIONS REGARDING THE 5C LICENSE IS CRITICAL TO THE ROLL-OUT OF DTV.

3. As proposed by 5C, their technology would manage the distribution of encrypted cable programming, but NOT unencrypted broadcast programming.

4. On March 2, 2001, 12 leading legislators (including Senators Hollings, Stevens and Breaux and Congressmen Tauzin, Dingell and Upton) sent a letter to FCC Chairman Powell urging that protection against broadcast programming being uploaded onto the Internet should be a part of any new content protection system approved by the FCC under 47 U.S.C. 549.

5. Last year, the seven studios divided on this issue. Warner Brothers and Sony (although supportive of protecting broadcast programming against Internet retransmission), signed 5C license agreements without insisting on inclusion of broadcast protection. The other 5 Studios, declined to sign 5C licenses until 5C would agree to include broadcast protection as part of their specifications.

6. In October 2001, at a meeting between the 5 Studios and 5C, 5C stated that the protection of broadcast programming was "desirable" (conceding the point raised by the 12 legislators), and that a detailed technical proposal advanced by the 5 Studios was "implementable." 5C raised only two objections. First, they expressed concerns that inclusion of the broadcast protection hardware/software within the 5C specification could raise antitrust concerns. Second, 5C expressed a desire to "vet" the technical proposal more fully within the computer and consumer electronics industries.

7. These same two concerns were advanced by 5C representatives at meetings with FCC Staff in November 2001.

8. The 5 Studios have worked hard to satisfy both of the concerns expressed by 5C. First, outside anti-trust Counsel for the MPAA has written a letter to FCC Chairman Powell explaining why inclusion of the broadcast component in the 5C specification does NOT raise any anti-trust concerns. Second, the Studios have participated in the requested "vetting" process in a series of meetings under the auspices of the CPTWG. Those meetings will be concluded by March 31, 2002.

9. THEREFORE, there is no valid reason for the 5C to continue to resist inclusion of the broadcast protection component in the 5C specifications. Therefore, if 5C agrees to include the broadcast component in the 5C license, and subject to the independent judgment of each individual studio (and the resolution of comparatively minor issues specific to each studio), the studios are prepared to conclude license agreements with 5C.

10. Because the conclusion of the 5C agreements will help facilitate the DTV roll-out, there is a public interest basis for government officials to mandate that 5C now agree to the broadcast component. The 5 Studios then commit that they will use best efforts, in tandem with 5C, to secure mandates – either by legislation or regulation – for inclusion of the broadcast protection component in all affected consumer electronic devices.

11. Discussions regarding (1) implementing a broader legislative mandate regarding the overall content protection technology issue or (2) mandating just the broadcast component more broadly among digital media devices, are no excuse for further delay in concluding a 5C license agreement which includes protection of broadcast content.

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Chairman Michael K. Powell
Federal Communications Commission
445 12th Street, S.W., Room 844
Washington, D.C. 20554

Re: *Federal Communications Commission*

Dear Chairman Powell:

Jack Valenti of the Motion Picture Association of America asked me to review for you our strong conviction that the U.S. antitrust laws do not preclude or limit cross-industry negotiations and licenses of technical measures for the purpose of providing protection for unencrypted digital terrestrial television broadcasts ("DTV") against unauthorized redistribution over the Internet (and other routing to unprotected digital outputs and unauthorized recording technologies). This issue relates to the question of whether effective protection against unauthorized Internet retransmission of broadcast material can be achieved by private licensing measures, or must be mandated by the Commission or the Congress.

As the Commission is aware, high-value, copyrighted DTV content is generally transmitted "in-the clear" and unprotected by encryption, unlike content delivered via other distribution channels. Industry consensus watermarks or descriptors that are embedded or tagged in copyrighted DTV content, however, can serve to identify legally protected content and convey usage rules controlling unauthorized retransmission. Cross-industry standards-setting and associated licensing activities that serve to promote detection and response to such industry-consensus redistribution-control watermarks or descriptors in DTV signals are fully justifiable and legitimate activities under the federal antitrust laws.

When analyzing antitrust questions of the sort involved here, it is important to bear in mind that the rights secured to content owners by the intellectual property laws exist in harmony with the purposes of the federal antitrust laws. As the Department of Justice and the Federal Trade Commission have explained in their Antitrust Guidelines for the Licensing of Intellectual

Property, "[t]he intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare." Id. at § 1.0.

Consumer welfare will not be promoted in an environment that allows unlimited unauthorized copying and retransmission of high-value programming content on the Internet since such risks of exposure diminish incentives to provide such content. As one former FCC Commissioner recently observed:

> Given the ease with which digital information can be replicated, the perfect quality of every digital copy, and the limitless distribution potential of the Internet, content producers understandably are concerned about placing their works on a cable system or broadcast network without adequate protections in place . . . . But if a first-run digital product immediately can be captured off air or off cable and replicated like a master copy or webcast globally-without payment to copyright holders, producers are going to be reluctant to release their product.*

As explained in the DOJ-FTC Guidelines, circumstances that permit unauthorized parties to "rapidly exploit the efforts of innovators and investors without compensation" are sure to "reduce the commercial value of innovation and erode incentives to invest, ultimately to the detriment of consumers." Id. Measures to control such unauthorized exploitation of intellectual property have the real potential for delivering significant consumer benefits, which in the instant case take the form of an expeditious and successful DTV transition supported by an ample supply of high-value, digitally originated programming.

The existence of such consumer benefits flatly rules out any contention that the negotiation and implementation of appropriate technological standards in this area amount to a *per se* violation of the antitrust laws, even if such acts are viewed as joint conduct among competitors subject to Section 1 of the Sherman Act. Rather, any antitrust analysis must turn, as in "the vast majority of cases [of] restraints in intellectual property licensing arrangements," DOJ-FTC Guidelines at § 3.4, on rule-of-reason type review of the circumstances, details and logic of the standards at issue. See also California Dental Association v. FTC, 526 U.S. 756 (1999). Here, rule of reason review is readily satisfied in light of the consensus-driven, multi-industry evolution of standards, the presence of consumer benefits, the absence of market power in the relevant technology market, the lack of effective alternative solutions and the parity of treatment between DTV and all other modes of digital content distribution.

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* Remarks of former FCC Commissioner Susan Ness, Los Angeles, Dec. 16, 1999 at 4.

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We hope that this addresses any questions that you may have on this subject but remain available at any time to respond to further inquiries.

Respectfully submitted,

Daniel G. Swanson
of Gibson, Dunn & Crutcher LLP

DGS/lr

cc: Mr. Kenneth Ferree, Chief, Cable Services Bureau

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